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July 7, 2014

**BY HAND DELIVERY**

Jeff S. Jordan, Esq.  
Assistant General Counsel  
Complaints Examination & Legal Administration  
Federal Election Commission  
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Washington, D.C. 20463

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FEDERAL ELECTION  
COMMISSION  
2014 JUL -8 AM 10:03  
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COUNSEL

**Re: MUR 6821**

Dear Mr. Jordan:

On behalf of the Democratic Senatorial Campaign Committee ("DSCC") and Deanna Nesburg, in her official capacity as Treasurer, we submit this letter in response to the complaint filed by the New Hampshire Republican Party (the "Complaint") on May 21, 2014 alleging a violation of the Federal Election Campaign Act (the "Act") or Commission regulations.

The Complaint falsely alleges that Senator Jeanne Shaheen, Shaheen for Senate (the "Campaign"), and the DSCC engaged in prohibited coordination with Senate Majority PAC ("SMP") in connection with an advertisement criticizing New Hampshire Senate candidate Scott Brown. The only factual basis for the Complaint's allegation is the alleged similarity in theme between SMP's advertisement and earlier communications made by the Campaign and the DSCC on publicly available websites. The Commission has made clear on several occasions that such activity does not provide a basis to find that a communication is "coordinated." Because the Complaint does not allege any other facts showing that coordination took place, and because no coordination did take place, the Federal Election Commission (the "Commission") should dismiss the Complaint and close the file.

**FACTUAL BACKGROUND**

The Complaint alleges that "[o]n April 23, 2014, Shaheen published on her website an advertisement script used by [SMP]." Compl. at 2. That is false. The script for the SMP

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advertisement that aired on April 25, 2014 never appeared on the Campaign's website.

The Campaign did post a message (the "Campaign Message") on its website, which is available to the public, that read, in relevant part:

More attack ads. Paid for by the Koch Brothers and their special interest money..

More proof big oil, the Koch Brothers and Wall Street think they can buy our Senate seat for Scott Brown.

When Brown was the Senator from Massachusetts he gave big oil and Wall Street billions in special breaks. They gave him millions in campaign contributions.

Jeanne Shaheen voted to stop those special breaks. She's leading the fight for a bipartisan bill to lower energy costs for consumers and create jobs.

Jeanne Shaheen. Making a difference for New Hampshire.

See Jeanne Shaheen for Senate, "An Important Message for New Hampshire," *available at* <http://jeannshaheen.org/message/>.

On April 24, 2014, the DSCC posted a message on its Twitter page – which, like the Campaign website, is available to the public – that said: "Koch brothers are trying to buy Scott Brown a Senate seat. Read why here." See DSCC, Twitter (Apr. 24, 2014 4:45 PM EST), <https://twitter.com/dscc/status/459433019669884929>. The Tweet included a link to the Campaign Message. The DSCC Tweet was not a request or suggestion that any group make a communication on the Campaign's behalf; it was simply an effort to alert the public about information about Senator Brown.

Finally, according to news reports, SMP began airing a television advertisement (the "SMP Advertisement") in New Hampshire on April 25, 2014, criticizing Scott Brown for voting to give oil companies tax breaks.<sup>1</sup> The advertisement read as follows:

Scott Brown's carrying some big oil baggage. In Massachusetts, he voted to give oil companies big tax breaks—they make record profits, he collects over four hundred thousand in campaign contributions.

Now Brown's shopping for a new Senate seat. In oil rich Texas? The oil fields of North

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<sup>1</sup> See "Ad Audit: Attack Ad Draws Charges of Improper Coordination by Shaheen Campaign," New Hampshire Public Radio, *available at* <http://nhpr.org/post/ad-audit-attack-ad-draws-charges-improper-coordination-shaheen-campaign>.

Dakota?

Nope, Brown wants to bring his big oil baggage to New Hampshire.

Scott Brown: Out for himself and big oil at our expense.<sup>2</sup>

There are some similarities between the Campaign Message, which the DSCC Tweet linked to, and the SMP Advertisement. They both criticize Senator Brown for his votes to give tax breaks to oil companies and for accepting campaign contributions from the oil industry. But there are also significant differences between the Campaign Message and the SMP Advertisement. The Campaign Message criticizes Senator Brown for voting for tax breaks for Wall Street and for accepting campaign contributions from Wall Street; the SMP Advertisement does not mention Wall Street at all. The Campaign Message refers to attack ads paid for by the Koch Brothers and their support for Senator Brown; the SMP advertisement does not. And, finally, the Campaign Message highlights Senator Shaheen's opposition to these tax breaks, and her support for a bipartisan bill to lower energy costs for consumers and create jobs; the SMP Advertisement does not refer to Senator Shaheen.

Other than the partial similarities between the Campaign Message and the SMP Advertisement, the Complaint does not marshal any evidence that the DSCC, the Campaign, or Senator Shaheen, coordinated with SMP on the SMP Advertisement. And, in fact, they did not. The DSCC did not request or suggest that SMP create the SMP Advertisement; the DSCC did not have any involvement (let alone "material involvement") in the creation, production, or dissemination of the advertisement; and the DSCC did not discuss with SMP the Campaign or the DSCC's plans, projects, activities, or needs.

## LEGAL ANALYSIS

### A. The Complaint Does Not Allege Facts Establishing that the SMP Advertisement was a Coordinated Communication

A communication is a "coordinated communication" under 11 C.F.R. § 109.21 only if it satisfies the payment prong, content prong, and conduct prong. The Complaint does not allege facts showing that the content prong or conduct prong was met. Accordingly, the Complaint does not establish that the SMP Advertisement was a coordinated communication.

#### 1. Content Prong

The content prong is satisfied if the communication "disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized

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<sup>2</sup> See "Baggage," YouTube, available at <https://www.youtube.com/watch?v=GkjjRSZYDwc>.

committee.” 11 C.F.R. § 109.21(c)(2). The Complaint alleges that the SMP Advertisement republished campaign materials in violation of this provision. It decidedly did not. A republished communication, by definition, must *copy* the original materials; the creation of a communication with thematic *similarities* to the original materials does not amount to “republishing.”

In MUR 2272 (American Medical Association), for example, it was alleged that the incorporation of publicly available information into a third party’s advertisement amounted to “republishing.” The Commission rejected this legal theory. As then-Commissioner Josefiak explained:

[T]he Commission regulations cited do not ‘prohibit’ gaining information or researching ideas from campaign materials for use in entirely new communications. The regulations do not convert independent expenditures for those communications into contributions based upon a similarity or even identity of themes with the campaign effort. Ideas and information can come from many sources, and their commonality is of itself insufficient to demonstrate either coordination or ‘copying.’

MUR 2272, Statement of Reasons of Commissioner Josefiak at 8. Likewise, in MUR 2766 (Auto Dealers and Drivers for Free Trade Political Committee), the Commission rejected the theory that the similarity between a third party advertisement and a campaign communication was evidence that the third party advertisement was coordinated with the campaign. Again, Commissioner Josefiak explained that “[t]he practical reality is that an intelligently planned independent expenditure effort will always employ similar themes and issues, or attack the same weaknesses of the opponent, as the campaign of the beneficiary candidate.” MUR 2766, Statement of Reasons of Commissioner Josefiak at 23.

That is what happened here. It is well-known that Senator Brown’s support for oil industry tax breaks and the financial support he has received from the industry are political liabilities. Notably, when he ran for reelection to a U.S. Senate seat in Massachusetts in 2012, Senator Brown was criticized in the same way. *See* Tell Sen. Scott Brown: Look Out for America’s Clean Energy Future, Not Big Oil Profits (“Every day, oil continues to pour into the Gulf of Mexico. And oil money pours through the halls of Congress. And \$45,000 of it flows right into the pocket of our Senator”); Scott Brown: Gone Washington (“Scott Brown’s gone to Washington, and something’s gone horribly wrong. Brown sided with big oil, taking thousands from oil companies just weeks before he voted to keep their special tax breaks.”).<sup>3</sup> It is not surprising that Senator Brown is facing similar criticism in his campaign for U.S. Senate in New Hampshire in 2014. The mere fact that the Campaign and SMP are employing similar criticisms

<sup>3</sup> These videos can be found at <https://www.youtube.com/watch?v=kHUIPwZ8QWs> and <https://www.youtube.com/watch?v=WE0S5CWHHCY>, respectively.

of Senator Brown plainly does not amount to “republishing.”

Finally, while the Commission need not reach the issue to dismiss the Complaint – *see infra* at Part A2, explaining why the “conduct prong” has not been met – we dispute the Complaint’s conclusion that the SMP advertisement included express advocacy or its functional equivalent. The advertisement does not include explicit words urging Granite Staters to vote against Senator Brown and is susceptible of a reasonable interpretation other than an appeal to vote against him (e.g. as criticism of his votes for Big Oil and receipt of campaign contributions from Big Oil).

## 2. Conduct Prong

The Complaint alleges that the posting of the DSCC Tweet also satisfied the conduct prong. That allegation is wrong as a matter of law. The Commission’s regulations are clear that communications appearing on a publicly available website – such as the DSCC Tweet – are *never* a basis to find that the conduct prong has been satisfied.

In 2003, the Commission published its revised coordination rule. As part of the rule, the Commission established that a “request or suggestion” by a campaign that a third party disseminate a communication on its behalf satisfied the “conduct prong.” 11 C.F.R. § 109.21(d)(1). However, the Commission clarified in its Explanation and Justification that a request or suggestion on a publicly available website could *never* satisfy the “conduct prong.” As the Commission explained, “[t]he ‘request or suggestion’ conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).” Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (emphasis added).

Three years later, the Commission again clarified that the use of publicly available information by a third party did *not* satisfy the content prong. The Commission explained, “[u]nder the new safe harbor, a communication created with information found, for instance, on a candidate’s or political party’s Web site, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication.” Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006) (emphasis added).

Because the DSCC Tweet appeared on a publicly available website, its posting by the DSCC cannot be a basis to find that the SMP Advertisement satisfied the conduct prong. And the Complaint alleges no other facts showing that the conduct prong has been met.

**B. The Commission Must Reject the Complaint's Request for an Investigation**

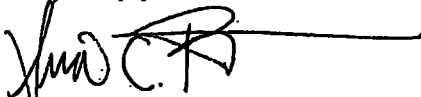
Notwithstanding that it fails to allege specific facts showing a violation of the Act or Commission regulations, the Complaint requests an investigation into "communications, including phone logs, conversations, emails and written documents" among the Campaign, the DSCC, and SMP. Compl. at 1. The Act does not allow the Commission to engage in such a fishing expedition.

The Act requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a precondition to opening an investigation into the alleged violation. 2 U.S.C. § 437g(a)(2). In turn, the Commission may find "reason to believe" only if a complaint sets forth sufficient specific un rebutted facts, which, if proven true, would constitute a violation of the Act. See 11 C.F.R. § 111.4(a), (d); MUR 4960, Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas (Dec. 21, 2001). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation. *Id.*

The Complaint does not set forth sufficient specific un rebutted facts, which, if proven true, would constitute a violation of the Act. For the reasons set forth herein, the specific facts that it does allege – that the Campaign posted the Campaign Message on its publicly available website; that the DSCC sent a Tweet on a publicly available website linking to the Campaign Message; and that SMP subsequently aired the SMP Advertisement – do not constitute a violation of the Act. The remaining accusations – for example, that the Campaign posted the script used in the SMP Advertisement on its own website or that the Campaign "illegally coordinated" with the DSCC and SMP – are either demonstrably false or unwarranted legal conclusions.

Because the Complaint has not alleged facts that provide a sufficient basis for the Commission to find "reason to believe" that the Act or Commission regulations have been violated, the Commission must reject the Complaint's demand for an investigation. It should instead dismiss the Complaint and close the file.

Very truly yours,



Marc E. Elias  
Aria C. Branch

Counsel to the Democratic Senatorial Campaign Committee